IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.04.2008

CORAM :

THE HON'BLE MR.JUSTICE P.R.SHIVAKUMAR

A.S.No.756 of 1997

Saradhambal ... Appellant

Vs.

1.Kasiammal
2.Kangammal
3.Neelakanta Moopar ... Respondents

This appeal has been filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 07.02.1997 rendered in O.S.No.243 of 1991 by the Subordinate Judge, Tiruppattur, North Arcot District.

For Appellant : Mr.V.P.Venkat (N.A.)
For Respondent 1&2 : Mr.R.Balaji
For Respndent 3 : No Appearance

JUDGMENT

This appeal is directed against the judgment and preliminary decree dated 07.02.1997 passed by the learned Subordinate Judge, Tirupattur, North Arcot District (now Vellore District) in O.S.No.243 of 1991. The respondents 1 and 2 in the present appeal were the plaintiffs. The appellant herein was the first defendant and the third respondent herein was the second defendant in the original suit.

2. The respondents 1 and 2 herein filed the above said suit for partition in respect of the suit properties, both movable and immovable, described in the schedule attached to the plaint as items 1 to 17. Items 1 to 14 are immovable properties whereas items 15 to 17 are cattles. According to the plaint allegations, all the suit properties were the ancestral properties of one Chinnappa Moopar who died intestate in or about 1982. He and his son Shanmugam Moopar were coparceners entitled to equal moieties in the suit properties. On the death of Chinnappa Moopar, his half share devolved upon his son Shanmugam Moopar, daughters Kasiammal and Kanagammal (the plaintiffs in the suit) and his wife Chinnakannammal equally. As such, each one of the plaintiffs and the said Chinnakannammal became entitled to 1/8 share. In all Shanmugam Moopar was entitled to 5/8 share (= share as coparcener and 1/8 as the legal heir of Chinnappa Moopar). The above said Shanmugam Moopar predeceased Chinnakannammal. On his death, his wife Saradammal and mother Chinnakannammal became entitled to his property in equal moieties. As such, the 5/8 share of Shanmugam Moopar was to be shared equally between Chinnakannammal and Saradambal. Each one of them got 5/16 share in the suit properties as a legal heir of Shanmugam Moopar. In all Chinnakannammal W/o.Chinnappa Moopar became entitled to 7/16 share. On her death in 1990, the

same devolved upon her daughters Kasiammal and Kanagammal, the plaintiffs. Thus each one of the plaintiffs, in all, became entitled to 11/32 share in the suit properties. The remaining 10/32 share would go to the first defendant Saradambal. As an extent of 1.48.0 hectares comprised in Survey No.66/5 and an extent of 0.06.0 hectares comprised in Survey No.66/6 described as items 3 and 4 in the plaint schedule were purchased by the second defendant Neelakanda Moopar from the first defendant without the consent of the plaintiffs in and by a sale deed dated 04.03.1991, there arose a necessity for the plaintiffs to claim partition. As the defendants were not prepared for a peaceful partition without the intervention of the court, the plaintiffs were constrained to file the suit for the reliefs of partition, separate possession and mesne profits.

3. The plaintiffs had made a further averment in the plaint to the effect that Shanmugam Moopar did not acquire any property in his name; that he had no independent source of income to acquire any property and that if at all any property had been acquired in his name, the same would have been acquired out of the joint family income alone and hence the same should be treated as the properties available for partition.

4. The suit was resisted by the appellant/first defendant by filing a written statement containing the following averments, besides denial of the plaint averments: Chinnappa Moopar and his brothers were jointly enjoying the properties belonging to their family for sometime and later on they effected a partition among themselves. The properties which came to the share of Chinnappa Moopar were in the joint enjoyment of Chinnappa Moopar and his son Shanmugam Moopar. The properties described as items 1 and 2 in the plaint schedule were the properties purchased by Shanumgam Moopar out of his own personal earnings even during the life time of his father Chinnappa Moopar. They were purchased from one Manickammal and Samikannu on 01.03.1971. Hence the said properties, by no stretch of imagination could be termed as acquisitions made with the help of the joint family income. Similarly, the property described as item 5 in the plaint schedule was purchased by the appellant/first defendant from one Nataraja Moopar on 01.05.1975 out of her own money and it was she who was all along enjoying the same as her separate property. As such, the prayer for partition in respect of items 1, 2 and 5 are bound to be rejected. The properties described as items 3 and 4 were sold by the first defendant to the second defendant for proper consideration on 04.03.1991 and possession was also delivered to him. Though the plaintiffs were aware of the same, in order to harass the first and seconf second defendants, they have included those properties also in the suit for partition. The description of items 13 and 14 are not correct. The cattles described in item 16 was not available to the family at any point of time. The share claimed by the plaintiffs are not correct.

5. With the said averments found in the written statement she had prayed for the dismissal of the suit with exemplary cost. The second defendant also contested the suit by filing a separate written statement containing similar averments.

6. The learned Subordinate Judge, Tiruppatur framed necessary issues and conducted trial. Three witnesses were examined as P.W.1 to P.W.3 and two documents were marked as Ex.A1 and Ex.A2 on the side of the plaintiffs. Three witnesses were examined as D.W.1 to D.W.3 and forty documents were marked as Ex.B1 to Ex.B40 on the side of the defendants.

7. At the conclusion of trial, on an appreciation of evidence adduced on either side, the learned Subordinate Judge passed a preliminary decree directing division of items 1 to 14 of the suit properties into 32 equal shares and allotment of 18 such shares to each one of the plaintiffs and dismissed the suit in respect of items 15 to 17. So far as items 3 and 4 are concerned, a direction has been issued in the preliminary decree that they should be allotted to the share of the first defendant.

8. Aggrieved by the same, the present appeal has been brought forth by the appellant herein/first defendant, on various grounds set out in the memorandum of appeal.

9. The points that arise for consideration in this appeal are as follows:

1.Whether items 1 and 2 of the suit properties are the separate properties of Shanmugam Moopar and hence the plaintiffs are not entitled to any share? and
2.Whether item 5 of the suit property is a separate property of the appellant/first defendant and hence the plaintiffs are not entitled to any share?

10. The first defendant in the original suit is the appellant in this appeal. Plaintiffs 1 and 2 in the original suit are the respondents 1 and 2 in the appeal. Second defendant in the suit is the third respondent in the appeal. The suit was filed for partition of fourteen items immovable properties shown as Items 1 to 14 in the description of properties given in the plaint schedule and three movable properties shown as items 15 to 17. The suit was dismissed in respect of the movable properties, namely items 15 to 17 of the plaint schedule and a preliminary decree for partition was passed in respect of items 1 to 14 of the plaint schedule properties. The judgment and preliminary decree of the trial court is not challenged in the appeal in respect of all other properties excepting items 1, 2 and 5 of the plaint schedule properties. Other properties, namely items 3, 4 and 6 to 14 are admittedly ancestral properties belonging to the Hindu undivided family in respect of which the Respondents 1 and 2 / plaintiffs 1 and 2 do have a right to claim shares. But the appellant/first defendant contended before the court below that the properties described as items 1, 2 and 5 in the plaint schedule were not available for partition as items 1 and 2 were the separate acquisitions of her husband and item 5 was her self-acquired absolute property. Admittedly items 1 and 2 were purchased by Shanmugam Moopar, the husband of the appellant/first defendant. Both items 1 and 2 were purchased in his name in and by a sale deed dated 01.03.1971. The same has been produced and marked on the side of the defendants as Ex.B10.

11. The case of the respondents 1 and 2/plaintiffs 1 and 2 is that Chinna Moopar and his son Shanmugam Moopar constituted a co-parcenery and while they still continued as members of the undivided Hindu family items 1 and 2 were purchased in the name of one of the coparceners, namely Shanmugam Moopar, with the help of the joint family income derived from the other coparsenary properties and that hence the same was nothing but an acquisition made by the joint family.

12. On the other hand it is the contention of the appellant/first defendant that the said properties were self-acquisitions of her husband Shangmugam Moopar and hence the plaintiffs could not claim the same to be co-parcenery properties belonging to the joint family of which Chinnappa Moopar and Shanmugam Moopar were coparceners.

13. Admittedly, Shanmugam Moopar, the husband of the appellant/first defendant did not have any independent source of income. It is also not in dispute that till the death of Chinnappa Moopar, there was no partition between himself and his son Shanmugam Moopar. Apart from leading evidence to the effect that items 1 and 2 of the suit properties were purchased in the name of Shanmugam Moopar while Chinnappa Moopar and Shanmugam Moopar remained members of the same Hindu undivided family, clear evidence has also been adduced through PW1 and PW2 that the said properties were enjoyed along with the other properties as properties belonging to the joint family. The appellant/first defendant, who was examined as DW1 alone deposed to the effect that items 1 and 2 of the suit properties were purchased by her husband out of his own earnings. She would state further that with the help of the income derived from agriculture and from using bullock carts, items 1 and 2 of the suit properties were purchased by her husband. But there is no evidence as to who was the owner of the bullock cart and in which property her husband was doing cultivation before

the purchase of items 1 and 2 of the suit properties. DW2 and DW3 do not say anything regarding the source of income from which items 1 and 2 were purchased by Shanmugam Moopar. Clear evidence has been adduced through PW2 that the properties purchased in the name of Shanmugam Moopar were enjoyed by the family as joint family properties along with other properties and that they were never enjoyed by Shanmugam Moopar as his separate properties. There is no clear cut evidence adduced on the side of the defendants that Shanmugam Moopar did have any separate source of income. On the other hand there is a clear admission on the part of DW1 that items 1 and 2 were purchased by her husband while her husband and her father-in-law remained members of the same Hindu undivided family. Under such circumstances it shall be presumed that the acquisition made in the name of one of the coparceners was made with the help of the income of the joint family and hence the same was the acquisition made by the joint family in the name of one of its coparceners. A close scrutiny of the evidence of DW1 would show that there is some kind of admission that the joint family income available in the hands of Shanmugam Moopar was used for the purchase of items 1 and 2 of the suit properties under Ex.B10. In the absence of proper evidence to show that the property acquired in the name of the coparcener was acquired without using the income derived from the joint family nucleus, such a prosecution that the property is the joint family property, shall stand unrebutted.

14. Hence the finding of the court below that the said properties, namely items 1 and 2 of the suit properties, were also the joint family properties of Chinnappa Moopar and Shanmugam Moopar cannot be assailed. There is no defect or infirmity in the said finding that the respondents 1 and 2 / plaintiffs 1 and 2 were entitled to claim partition of the said properties also. There is no reason, whatsoever, to interfere with the said finding and the same has got to be confirmed.

15. So far as item 5 is concerned, admittedly, the said property was purchased in the name of the appellant/first defendant on 01.09.1975 under Ex.B12. As per plaint allegations Chinnappa Moopar, the kartha of the family died in or about 1982 and Shanmugam Moopar died in or about 1985. Therefore it is quite obvious that as on the date of Ex.B12 both the coparceners were alive. The appellant/first defendant was neither a coparcener nor a person who was having the income of the joint family in her hands. Under such circumstances there shall be no presumption that the acquisition made in the name of a member of a joint family who was not a coparcener was made for the joint family using the joint family income. In this case, apart from taking a consistent stand that item 5 of the suit properties was purchased by the appellant/first defendant in her name using the funds provided by her mother, the appellant/first defendant who figured as D.W.1 stated in her chief examination that her mother had 3 = acres of land; that the funds raised by selling that property was given to her husband and that with the help of the same, the 5th item was purchased in her name. But, in cross-examination she has stated that the 3 = acres of land belonging to her mother was leased out and the lease amount was used for the purchase of the 5th item in her name. Of course, it is true that except the testimony of D.W.1, there is no other evidence to corroborate the same. However, weak evidence adduced on the side of the defendants might be, the same alone shall not be enough to accept the case of the plaintiffs and decree the suit. When there is no scope for a presumption in favour of the plaintiffs, the plaintiffs have to prove that in fact the joint family income was used for the purchase of the said property in the name of the appellant/first defendant by adducing sufficient evidence. In this case, there is no such concrete evidence adduced on the side of the plaintiffs. In fact P.W.1 during cross examination, has admitted that her marriage took place 28 years prior to the date of her examination on 07.10.1996 and the second plaintiff's marriage took place 3 years after her marriage. There is no clear-cut evidence adduced on the side of the plaintiffs that the joint family income was used for the purchase of the 5th item of the suit properties in the name of the appellant/first defendant. Under such circumstances, the finding of the court below that the 5th item of suit properties was also the joint family property is against the weight of evidence and hence this court, without any hesitation, comes to the conclusion that the said finding is

defective and infirm and is liable to be reversed in this appeal.

16. So far as the share is concerned, Chinnappa Moopar and Shanmugam Moopar were entitled to half share in the joint family properties, namely items 1 to 4 and 6 to 14 of the suit properties. On the death of the Chinnappa Moopar, his half share devolved upon his son namely Shanmugam Moopar, daughters (the respondents 1 and 2 / Plaintiffs 1 and 2) and his wife Chinna Kannammal. Each one of them got 1/8 share. Thus, Shanmugam Moopar, became entitled to 5/8 share. Plaintiffs 1 and 2 became entitled to 1/8 share. P.W.1 has admitted that Shanmugam Moopar had got a son. Admittedly, the said child was born and died prior to the death of Chinnappa Moopar. On his birth he became a coparcener and as per Hindu Law, the said child would have been entitled to 1/4 share. Shanmugam Moopar entitled to 1/4 share and Chinnappa Moopar entitled to = share. Therefore, the court below has committed an error in postponing the notional partition of the share of the male child of Shanmugam Moopar till the death of Chinnappa Moopar. The said mistake has resulted in an error in calculation of the shares also. As on the date of death of the child of the Shanmugam Moopar, his share alone should have been separated notionally. Hene his 1/4 share should have gone to his mother, namely appellant/first defendant. On the death of Chinnappa Moopar, his half share devolved upon his son Shanmugam Moopar and plaintiffs equally. Each one got 1/8 share. Thus, Shanmugam Moopar became entitled to 3/8 share. On the death of Shanmugam Moopar, his share devolved upon his wife (appellant/first defendant) and his mother Chinna Kannammal each one became entitled to 3/16 share. Thus, in all, appellant/ first defendant became entitled to < + 3/16 = 7/16 = 14/32 share. Chinnakannammal became entitled to 1/8 + 3/16 = 5/16 = 10/32 share. On the death of Chinnakannamal, her share devolved upon the first and second plaintiff equally. Thus each one of them became entitled to 1/8 + 5/32 = 9/32 share and the balance 14/32 shall be the share of the appellant/first defendant. In this regard, the court below has committed an error in calculating the shares to which each one of the parties to the suit is entitled. The said error has occurred because of the non-consideration of the effect of the child born to Shanmugam Moopar which child died during the life time of Chinnappa Moopar and Shanmugam Moopar itself. Therefore, this court comes to the conclusion that the judgment and preliminary decree of the trial court has to be modified to the above said extent.

17. The trial court has directed allotment of items 1 and 2 of the suit properties to the share of the appellant/first defendant so that the rights of the 3rd respondent/2nd defendant who purchased them from the appellant/first defendant would not be affected. In this regard, there is no appeal objection. The said direction incorporated in the decree is also based on the principle of equity and valid reasons. Therefore, there is no need or scope for interfering with the said direction incorporated in the preliminary decree of the trial court.

18. For all the reasons stated above, the appeal is allowed in part and the preliminary decree passed by the Subordinate Judge, Tiruppatthur is set aside so far as item 5 of the suit properties is concerned. So far as items 1 to 4 and 6 to 14 of the suit properties, the preliminary decree passed by the trial court is modified by directing the division of the said properties into 32 shares and allotment of 9 such shares to each one of the respondents 1 and 2/plaintiffs 1 and 2. Subject to the above modification, in all other respects, the preliminary decree of the trial court passed in respect of items 1 to 4 and 14 shall stand confirmed. The dismissal of the suit in respect of item 15 to 17 shall also stand confirmed. The parties are directed to bear their own respective costs in this appeal.

09.04.2008
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Internet : Yes

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To

The Subordinate Judge, Tiruppattur.

P.R.SHIVAKUMAR, J.,

ASR

A.S.No.756 of 1997

Dated : 09.04.2008